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MULTINATIONAL CORPORATIONS IN INTERNATIONAL LAW

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ABSTRACT

This paper analyses the status, rights and obligations of multinational corporations (MNCs) under international law, focusing in particular on international human rights, investment, environmental and criminal law. Private companies wield increasing economic and social power, frequently rivalling the one of states. While they are thereby in a position to contribute to the economic and technological development of societies, they can also harm human rights, damage the environment, or commit crimes. Domestic law has proven to be insufficient to promote the positive effects of business by safeguarding a stable and reliable economic environment, and to curb the negative effects by ensuring accountability. Assessing MNCs in the framework of international law, this paper comes to the conclusion that, independent of whether or not MNCs have international legal personality, they enjoy considerable rights under international investment law and under international human rights law. Conversely, MNCs do not have binding obligations under international law, notwithstanding a range of initiatives, attempting to create, both, voluntary and non-voluntary instruments.

KEY WORDS
Bilateral investment treaties – European Court of Human Rights – Global Compact – Guiding Principles on Business and Human Rights – ILO Tripartite Declaration – Multinational corporations – OECD Guidelines for Multinational Enterprises – UN Draft Norms

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I. INTRODUCTION

The past four decades have witnessed a dramatic rise of globalised business. Today, an estimated 100,000 multinational corporations (MNCs) account for about a quarter of the global gross domestic product (GDP)[1] and generate a turnover which exceeds the public budget of many states.[2] The private sector wields considerable economic and social power and even increasingly expands into traditionally state-run sectors, fulfilling (quasi-)governmental functions by providing infrastructure, housing, and health services or organizing elections.[3]

MNCs can thereby contribute to the economic and technological development of societies,[4] but also harm human rights, damage the environment, or even commit crimes. National legislation is often unable to create a stable regulatory environment in which MNCs can operate, as well as to exercise control over the harmful acts of entities which fragment their activities globally, operate in decentralised network structures, and flexibly relocate operations and profits.[5] In addition, economically weaker states depend on the investments of MNCs and may be unwilling to enact and enforce demanding human rights and environmental standards in order to enhance their attractiveness to foreign investors.[6]

The perceived inadequacy of domestic legislation to effectively regulate the activities of MNCs has moved the focus to the level of international law. Two dynamics are discernible. Firstly, acknowledging the beneficial effects of international business, efforts have been made to provide companies with a stable environment by granting them rights under international investment and international human rights law. Secondly, reacting to repeated reports about involvement of MNCs in human rights abuses, grave environmental damages and crimes, a number of initiatives have aimed at holding companies accountable under international human rights, environmental and criminal law.

After a short overview of the terminological indeterminacy of the subject matter (II.), this chapter will analyse whether MNCs are subjects of international law (III.) and whether they have rights (IV.) and obligations (V.) under international law. The focus will lie on four legal fields whose recent developments have particularly impacted the

[1] UNCTAD, 'World Investment Report: Non-Equity Modes of International Production and Development' (2011) UN Doc UNCTAD/WIR/2011, 24 and web table 34, <http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf> accessed 5 December 2013.
[2] See John Mikler, 'Global Companies as Actors in Global Policy and Governance' in John Mikler (ed), *The Handbook of Global Companies* (Wiley-Blackwell 2013) 1, 4 ff.
[3] Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Elgar 2011) 4.
[4] Olivier De Schutter, Jan Wouters, Philip De Man, Nicolas Hachez and Mattias Sant'Ana, 'Foreign Direct Investment, Human Development and Human Rights: Framing the Issues' (2009) 3 Human Rights & International Legal Discourse, 137, 159.
[5] Gatto (n 3) 14; Nicolás Zambrana Tévar, 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' (2012) 4 Cuadernos de Derecho Transnacional 398, 400.
[6] Jan Wouters and Leen Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6 Northwestern Journal of International Human Rights 262; Jan Wouters and Cedric Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40 The George Washington International Law Review 939 f.

status of MNCs under international law: human rights protection and responsibilities, investment protection, environmental obligations, and accountability for international crimes.

II. DEFINITION

The discussion about MNCs has been characterised by a wealth of different terminologies.[7] In the United Nations (UN) framework the term 'multinational corporations' was originally used and defined as 'enterprises which own or control production or service facilities outside the country in which they are based'.[8] This terminology changed into 'transnational corporation'[9] to emphasise the cross-border operation of the respective company and to distinguish it from such 'multinational corporations' which are 'owned and controlled by entities from several countries'.[10] However, this distinction was later abandoned and the 2003 *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* define the 'transnational corporation' as an 'economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'.[11]

OECD and ILO instruments, on the other hand, employ the term 'multinational enterprises'.[12] The *OECD Guidelines for multinational enterprises* – rejecting the need for a precise definition – describe them as follows:

These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.[13]

The terminological confusion is perpetuated in international legal scholarship. Even though scholars have attributed different meanings to the adjectives 'transnational' and 'multinational'[14] and even though 'corporation' can be understood more narrowly, designating a legal entity characterised by 'legal personality, transferable shares, limited liability, centralised management and investor ownership',[15] the terms are

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[7] See *inter alia* Jan Wouters and Leen Chanet, 'Rechten en plichten van (multinationale) ondernemingen in het internationaal recht' in Robby Houben and Stefan Rutten (eds), *Actuele problemen van financieel, vennootschaps- en fiscaal recht. Feestbundel 20 jaar Werkgroep financieel recht* (Intersentia 2007) 333, 335 ff.

[8] Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations (1974) UN Doc E/5500/Rev.1, ST/ESA/6, 25.

[9] See for instance the *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UNCHR, Sub-Commission on the Promotion and Protection of Human Rights (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (Draft Norms).

[10] Peter T. Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 6.

[11] Draft Norms para 20.

[12] See OECD, Guidelines for Multinational Enterprises (2011) <www.oecd.org/daf/inv/mne/48004323.pdf> accessed 5 December 2013; ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (4th edn, 2006) <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 5 December 2013.

[13] OECD Guidelines for Multinational Enterprises (n 12), part I, ch I, at 4; see ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (n 12) at 6.

[14] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 199 ff; Gatto (n 3) 38.

[15] Peter Muchlinski, 'Corporations in International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law (OUP 2010)*.

generally used synonymously. This terminological indeterminacy results from an inevitable 'degree of arbitrariness'[16] but it also mirrors the existing factual disorder. MNCs today comprise multiple business entities of various legal forms and display diverse forms of integration.[17] As Gatto has observed, MNCs have 'no coherent existence as a legal entity [but are] a political and economic reality which articulates itself in a confusing variety of legal forms and devices.'[18] It is therefore more helpful to focus on the characteristics that distinguish MNCs from their national counterparts. Other than domestic businesses – even those that operate production facilities abroad, or export goods and know-how – MNCs have the capacity to flexibly move places of production and assets between countries. They structure management units independently of national borders and lose every tie to a nation state except for the formal nexus of incorporation.[19] This operational fluidity and the ensuing detachedness from domestic bounds are one of the main reasons why national legislators fail to put adequate checks on the power of MNCs, and why MNCs have moved into the focus of international law.

III. INTERNATIONAL LEGAL PERSONALITY

The central debate on MNCs in international law focuses on the question of whether or not they are subjects of international law, that is, whether they are 'capable of possessing international rights and duties, and [have] capacity to maintain [their] rights by bringing international claims'.[20] Traditionally, international law was perceived as governing only the "mutual transactions between sovereigns".[21] With the rise of international organisations and international human rights law, however, the small circle of subjects of international law gradually expanded. Positivists assert that states – which remain the primary subjects of international law – can 'upgrade'[22] non-state actors to subjects of international law by endowing them with rights and obligations.[23] Non-state actors thus derive[24] their subjectivity from states and are dependent on their recognition.

Adhering to these formal prerequisites, the large majority of international legal scholars hold that MNCs do not possess international legal personality.[25] It is argued that they have not been granted rights or obligations under international law[26] and that although companies benefit from a range of international law provisions, they do not

[16] Muchlinski, *Multinational Enterprises and the Law* (n 10) 7.
[17] Gralf-Peter Calliess, 'Transnational Corporations Revisited' (2011) 18 Indiana Journal of Global Legal Studies 601, 604.
[18] Gatto (n 3) 38.
[19] See the detailed juxtaposition of MNCs and domestic enterprises in Muchlinski, *Multinational Enterprises and the Law* (n 10) 7 f.
[20] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.
[21] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Burns & Hart 1970) 296.
[22] Antonio Cassese, *International Law in a Divided World* (Clarendon 1986) 103.
[23] Karsten Nowrot, 'Reconceptualising International Legal Personality of Influential Non-State Actors: towards a Rebuttable Presumption of Normative Responsibilities' in John Fleurs (ed), *International Legal Personality* (Ashgate 2010) 369, 372.
[24] Peter Malanczuk, *Akehurst's modern introduction to international law* (7th edn, Routledge 1997) 104.
[25] Nowrot (n 23) 372 with further extensive references; Cassese (n 22) 103; Malanczuk (n 24) 100; Kay Hailbronner, 'Der Staat und der Einzelne als Völkerrechtssubjekte' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (4th edn, De Gruyter 2007) 178; Muchlinski, 'Corporations in International Law' (n 15); Eric De Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4 Human Rights and International Legal Discourse 66, 80; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 122.
[26] Cassese (n 22) 103; Régis Bismuth, 'Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders' (2009/2010) 38 Denver Journal of International Law and Policy 203, 204.

necessarily enjoy corresponding rights.[27] A few international legal scholars, on the other hand, have recognised MNCs as subjects of international law. Some have adopted a *de facto* approach based on their significant participation at the level of international law[28] and on the growing privatisation of international law as evidenced by investment law and arbitration.[29] Nowrot has gone further by completely breaking with the positivist view and asserting that a rebuttable presumption exists according to which MNCs are subjects of international law unless states and international organisations express the contrary in a legally binding form.[30] Others have left the question open,[31] sometimes adding that there is no legal impediment to their ascension in the canon of the subjects of international law.[32]

In an effort to overcome the traditional subject/object dichotomy which has generated extensive, 'sterile'[33] debates about the precise scope of the two categories, several legal scholars have advocated alternative approaches. Higgins powerfully described the classification into subjects and objects of international law as an 'intellectual prison' serving no 'functional purpose'.[34] According to her, international law is a dynamic decision-making process in which no subjects and objects exist, but only a variety of participants, including MNCs.[35] Clapham focuses on the capacity of non-state actors to have rights and obligations and, affirming both, he consequently attributes limited international personality to MNCs.[36] In a similar vein other scholars measure MNCs based on their roles and duties[37] or rights and responsibilities,[38] instead of concentrating on the 'label'[39] they carry. Klabbers has ascribed a merely descriptive and normatively empty value to the concept of international legal subjectivity. He concludes that 'personality is by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be usefully described as having a degree of international legal personality'.[40]

Instead of taking a position in this discussion, the present chapter will follow Alvarez' advice and focus on 'addressing which international rules apply to corporations rather than whether corporations are or are not subjects of international law'.[41]

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[27] See Malanczuk (n 24) 100: 'The fact that individuals or companies are the beneficiaries of many rules of international law does not mean that these rules create rights for the individual or companies, in much the same way as laws prohibiting cruelty to animals do not create rights for animals'.
[28] See David Adedayo Ijalaye, *The Extension of Corporate Personality in International Law* (Oceana 1978) 244 f; Dominique Carreau and Fabrizio Marrella, *Droit international* (11th ed, Pedone 2012) 66.
[29] Zambrana Tévar (n 5) 401.
[30] Nowrot (n 23) 379 ff.
[31] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 250; Katarina Weilert, 'Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards' [2009] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 883, 910.
[32] Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 Recueil des cours 112; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (8th ed, LGDJ 2009) 714 f.
[33] Simon Chesterman, 'Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones' (2010/2011) 11 Chicago Joumal of International Law 321, 327.
[34] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 49.
[35] *Ibid* 50.
[36] Clapham (n 14) 77 f.
[37] See Merja Pentikäinen, 'Changing International "Subjectivity" and Rights and Obligations under International Law – Status of Corporations' (2012) 8 Utrecht Law Review 145, 153.
[38] José E. Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 Santa Clara Journal of International Law 1, 31.
[39] Pentikäinen (n 37) 153.
[40] Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed, CUP 2009) 52.
[41] Alvarez (n 38) 31.

IV. RIGHTS UNDER INTERNATIONAL LAW

Notwithstanding the discussion about their international legal subjectivity, it is widely recognised today that MNCs enjoy certain rights under international law, especially in the fields of international human rights law and investment protection.[42]

A. INTERNATIONAL HUMAN RIGHTS LAW

The European Court of Human Rights (ECtHR or Court) is unparalleled at the international level in granting companies protection under human rights law. Art. 34 of the European Convention on Human Rights (ECHR or Convention) provides 'any person, non-governmental organisation or group of individuals' with the right to claim a violation of its rights before the Court, comprising corporations within the scope of 'non-governmental organisation'.[43] Companies have readily made use of this judicial option. Their claims invoke mostly Convention rights that do not necessarily presuppose an individual nexus,[44] especially procedural rights, the right to freedom of expression, and the right to peaceful enjoyment of possessions.

Of these rights, only the latter expressly refers to legal persons (Art. 1 of the First Protocol to the ECHR). However, the ECtHR has flexibly granted corporate applicants protection under a range of other Convention rights. Among these are the various due process guarantees of Art. 6(1) ECHR.[45] Under the ECHR, companies enjoy a right to a fair and public hearing by an independent and impartial tribunal,[46] access to a court,[47] equality of arms,[48] and reasonable length of the proceedings.[49] Frequently, media companies invoke the Convention on the grounds of alleged violations of the right to freedom of expression (Art. 10(1)). The ECtHR readily affirmed the applicability to companies in cases where the expression of opinion contained a political element,[50] reflecting 'controversial opinions pertaining to modern society in general'.[51]

Furthermore, the ECtHR decided in favour of the corporate applicants in three sets of cases which were less clear-cut and engendered significant legal debates: the protection of business premises as 'home', the protection of purely commercial speech under the right to freedom of expression, and the award of monetary compensation for non-pecuniary damages (Art. 41 ECHR).
The first of these cases arose under Art. 8(1) ECHR, which provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. In *Société Colas Est SA and Others v France* (2002) the claimants sued France over raids of their business premises by investigators acting without a court warrant, arguing that their right to respect for their home had been violated. There were weighty arguments against an application of Art. 8(1) ECHR to company

[42] Wouters and Chanet (n 7) 342 ff; Clapham (n 14) 82; Gatto (n 3) 61; Alvarez (n 38) 31; Pentikäinen (n 37) 148.
[43] Winfried van den Muijsenbergh and Sam Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25 Pacific McGeorge Global Business & Development Law Journal 43, 48.
[44] A term used by Emberland in the context of ECHR art 41, see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP 2006) 125 ff.
[45] *Ibid* 14.
[46] *Sovtransavto Holding v Ukraine* ECHR 2002-VII 95.
[47] *Silvester's Horeca Service v Belgium* App no 47650/99 (ECtHR, 4 March 2004).
[48] *Dombo Beheer B.V. v The Netherlands* (1993) Series A no 274; *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) Series A no 301-B.
[49] *Unión Alimentaria Sanders SA v Spain* (1989) Series A no 157.
[50] *Sunday Times v The United Kingdom* (1979) Series A no 30.
[51] *VGT Verein gegen Tierfabriken v Switzerland* ECHR 2001-VI 243; see also *Sunday Times v The United Kingdom* (n 50).

facilities, including the context of the provision, the drafting history, previous case law, as well as the narrow wording of the English text of the ECHR as opposed to the French term 'domicile'.[52] Notwithstanding, the ECtHR held that the character of the Convention as a living instrument required a dynamic interpretation of the provision to accommodate for changing conditions. It referred to the fact that companies enjoy a series of rights under the ECHR and concluded that 'the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises'.[53]

Secondly, in *Autronic AG v Switzerland* (1990) the ECtHR held that 'corporate speech' – communication in order to 'incit[e] the public to purchase a particular product'[54] – falls within the scope of Art. 10(1) ECHR. According to the Court, it is not necessary to 'ascertain the reason and purpose for which the right is to be exercised'. [55] The prevention of a purely commercial reception of a television programme by Swiss authorities was considered to amount to an interference with the right to freedom of expression.

The third case ensued when corporate applicants requested the payment of monetary compensation for non-pecuniary damages under Art. 41 ECHR, which grants successful applicants the entitlement to just satisfaction. In *Comingersoll SA v Portugal* (2001) the applicant had successfully argued that the length of a civil law suit before Portuguese courts constituted a violation of Art. 6(1) ECHR. The company claimed monetary compensation for its non-pecuniary damage, arguing that a distinction between natural and legal persons in this respect was unfounded. According to the Portuguese government on the other hand, monetary compensation should be awarded only for 'anxiety, the mental stress of having to wait for the outcome of the case and uncertainty' – 'feelings […] peculiar to natural persons'.[56] The ECtHR ruled in favour of the applicant. Adopting a nearly 'anthropomorphi[c]'[57] approach, it held that companies can suffer non-pecuniary damage such as a loss of 'reputation, uncertainty in decision-planning, disruption in the management of the company […] and […] the anxiety and inconvenience caused to the members of the management team'.[58] The protracted civil proceedings had caused the company, 'its directors and shareholders considerable inconvenience and prolonged uncertainty',[59] justifying the award of monetary compensation.

It has to be noted that the approach of the Court to extend even those provisions of the Convention to corporate applicants that have traditionally been considered to apply only to individuals, is in some instances counterbalanced by a more lenient standard of review.[60] With respect to Art. 10(2) ECHR the ECtHR established in *Markt intern Verlag GmbH and Klaus Beermann v Germany* (1989) that the state's margin of appreciation is 'essential in commercial matters' so that the 'Court must confine its review to the question whether the measures taken on the national level are justifiable

[52] Emberland (n 44) 114 f.
[53] *Société Colas Est and Others v France* ECHR 2002-III 105, para 41.
[54] *VGT Verein gegen Tierfabriken v Switzerland* (n 51) para 57.
[55] *Autronic AG v Switzerland* (1990) Series A no 178, para 47.
[56] *Comingersoll S.A. v Portugal* ECHR 2000-IV 339, para 28.
[57] Sébastien van Drooghenbroeck, 'La Convention européenne des droits de l'homme et la matière économique' in Laurence Boy, Jean-Baptiste Racine, Fabrice Siiriainen (eds), *Droit économique et droits de l'homme* (Larcier 2009) 25, 37.
[58] *Comingersoll S.A. v Portugal* (n 56) para 35.
[59] *Ibid* para 36.
[60] Emberland (n 44) 155 ff.

in principle and proportionate'.[61] In *Société Colas Est SA and Others v France* (2002) the ECtHR held that the applicant company had been violated in its right under Art. 8(1) ECHR, 'even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned'.[62] Nevertheless, companies enjoy a unique level of protection under the jurisdiction of the ECtHR, which has pioneered the application of human rights to corporate applicants.

Outside the scope of the ECHR, international human rights protection for companies is dim. The UN Human Rights Committee, entrusted with overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR), has recognised that notwithstanding the lack of explicit wording, legal entities may enjoy certain rights under the Covenant, such as the freedom to manifest one's religion or belief (Art. 18) and the freedom of association (Art. 22).[63] However, according to Art. 1 of the Optional Protocol to the ICCPR, only individuals can claim the violation of their rights before the Human Rights Committee. Companies therefore have to rely on domestic fora in order to obtain protection of their rights. The American Convention on Human Rights on the other hand explicitly accords human rights protection only to human beings.[64] Companies can bring petitions before the Inter-American Commission on Human Rights, but only *pro victima* on behalf of a natural person.[65]

B. International Investment Law

International investment law grants MNCs the most robust rights. Customary international law, bilateral and multilateral investment treaties, as well as agreements between MNC and host state, establish a set of rules for the protection of foreign direct investment.

Customary international law requires that for an expropriation to be lawful that it is undertaken in the public interest, without arbitrariness, and discrimination on the basis of nationality and accompanied by the payment of compensation.[66] The latter has been the subject of protracted disagreements between developed and developing countries, especially in the framework of the former's efforts to establish a New International Economic Order.[67] Developed countries endorse the *Hull* formula, which requires the payment of prompt, adequate, and effective compensation.[68]

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[61] *Markt intern Verlag GmbH and Klaus Beermann v Germany* (1989) Series A no 165, para 33; confirmed eg in *Casado Coca v Spain* (1994) Series A no 285-A, para 50; *Krone Verlag GmbH & Co KG v Austria (No 3)* (2003) ECHR 2003-XII 91, para 30.
[62] *Société Colas Est and Others v France* (n 53) para 49.
[63] UN Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 9.
[64] American Convention on Human Rights (*entered into force* 18 July 1978) OAS Treaty Series No 36 reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) art 1(2).
[65] Inter-American Commission on Human Rights, Rules of Procedure (2009) art 23; see also Julian Ku, 'The Limits of Corporate Rights Under International Law' (2012) 12 Chicago Journal of International Law 729 (750) with a reference to the Inter-American Commission on Human Rights' decision in Tabacalera Boquerón SA v Paraguay, OEA/Ser.L/V/II.98, Doc 6.
[66] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 99 f.
[67] *Ibid* 100.
[68] Rudolf Dolzer, 'Wirtschaft und Kultur' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (4th edn, De Gruyter 2007) 519.

The late 1950s saw the conclusion of the first bilateral investment treaties (BITs), designed to further and protect foreign direct investment. Today approximately 3,000 BITs are in force, and while no uniform standard exists, a typical BIT contains provisions on the following questions: personal and temporal applicability, definition of investment, treatment of foreign investment, expropriation, currency transfer, and dispute settlement.[69] Furthermore, many BITs include so-called 'umbrella clauses', which oblige the contracting parties to respect any other undertaking they may have entered into with regard to the investment of a national or a company of the other party, thereby elevating the contractual obligation with the investor into an international law obligation.[70]

The contracting parties commit to observing certain standards with regard to foreign investors, such as fair and equitable treatment, full protection and security, as well as non-discrimination. The latter requirement means that foreign investors may not be discriminated against, both compared to nationals of the host state (national treatment) and to investors from third countries (most-favoured nation treatment), although BITs can contain exceptions for members of an economic, tariff or monetary union, of a common market, or of a free trade area, as well as exceptions with regard to certain sensitive economic sectors.

Provisions on dispute settlement are the most innovative feature of BITs.[71] They provide investors with the possibility to bring claims directly against the host state, thereby constituting a powerful enforcement mechanism and contributing to the effective protection of investment. Typically investors can choose between proceedings before a domestic court of the host state or arbitration, either under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[72] or through the International Centre for Settlement of Investment Disputes (ICSID).[73]

BITs have been criticised for restricting the regulatory freedom of the host country and thereby hindering legislation for the protection of human rights or the environment.[74] Recent BITs take these objections into consideration and contain exception clauses to account for the public interest.[75] Other initiatives have aimed at providing policy guidance for sustainable development, such as the UNCTAD

[69] For an overview of the historical evolution of international investment agreements see Jan Wouters, Philip De Man and Leen Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries?' (2009) 3 Human Rights & International Legal Discourse 263.

[70] Prosper Weil, 'Problèmes relatifs aux contrats passés entre un État et un particulier' (1969) 128 Recueil des Cours 95, 130 ff.

[71] See *inter alia* Jan Wouters and Nicolas Hachez, 'The Institutionalization of Investment Arbitration and Sustainable Development', in Marie-Claire Cordonnier Segger, Markus Gehring and Andrew Newcombe (eds) *Sustainable Development in International Investment Law* (Kluwer Law International 2011) 615; Nicolas Hachez and Jan Wouters, 'International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?', in Freya Baetens (ed) *Investment Law within International Law* (Cambridge University Press 2013) 417.

[72] UNCITRAL Arbitration Rules (2010) <www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> accessed 5 December 2013.

[73] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

[74] Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' (2009) 3 Human Rights & International Legal Discourse 301.

[75] For an analysis of 'new generation' BITs see Jan Wouters, Sanderijn Duquet, Nicolas Hachez, 'International Investment Law: the Perpetual Search for Consensus' in Olivier De Schutter, Johan Swinnen, Jan Wouters (eds) *Foreign Direct Investment and Human Development* (Routledge 2012) 25.

Investment Policy Framework for Sustainable Development[76] and the IISD Model International Agreement on Investment for Sustainable Development, which seeks to achieve a balance between the obligations of the host state, the home state and the investor.[77]

A number of multilateral instruments contain similar provisions on investment protection, such as the North American Free Trade Agreement (NAFTA) or the 1994 Energy Charter Treaty. Between 1995 and 1998 the OECD made efforts to draft a Multilateral Agreement on Investment (MAI) in order to replace the multitude of BITs. Strong opposition by NGOs and developing countries, lack of support by the business world, and disagreements between the negotiating parties, particularly about sectoral exceptions as well as social and environmental issues, ultimately led to the abandonment of the project. A subsequent initiative under the auspices of the World Trade Organization (WTO) failed in 2004 due to concerns of the developing world about undue restrictions of their regulatory freedom.[78]

V. OBLIGATIONS UNDER INTERNATIONAL LAW

Since the 1970s a range of initiatives has attempted to close the perceived 'governance gap' and to rein in the power of MNCs by subjecting them to binding obligations under international law. Their success has been limited. According to the prevailing view, MNCs have no direct obligations under international law,[79] although there is a growing body of non-binding 'soft law' regulating their conduct.

A. INTERNATIONAL HUMAN RIGHTS LAW

MNCs can directly impact human rights in the societies they operate in, e.g. by employing children or forced workers, by operating on the territories of indigenous people without their consent, by using discriminatory recruitment policies, or by damaging the environment and thus endangering the life and health of people. They can also indirectly cause harm if they create incentives for state authorities to violate human rights for business purposes or if they support regimes engaged in human rights violations by providing infrastructure, financial means, or international credibility.

Under current international human rights law, however, States are the primary duty bearers, obliged to respect and fulfil human rights and to ensure their protection against abuses by private actors.[80] While they have enacted domestic legislation to regulate the conduct of companies chartered or operating in their territory, they have not yet imposed directly binding human rights obligations on them under international law.[81]

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[76] UNCTAD, 'Investment Policy Framework for Sustainable Development', <http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf> accessed 5 December 2013.

[77] IISD, Model International Agreement on Investment for Sustainable Development (2005) <www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 5 December 2013.

[78] Christoph Schreuer, 'Investments, International Protection' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law (OUP 2011).*

[79] Cassese (n 22) 103; Hailbronner (n 25) 178; De Brabandere (n 25) 80; Crawford (n 25) 122.

[80] For the respective obligations of home and host countries see Olivier De Schutter, 'La responsabilité des États dans le contrôle des sociétés transnationales : vers une convention internationale sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales' in Emmanuel Decaux (ed), *La responsabilité des entreprises multinationales en matière de droits de l'homme* (Bruylant 2010) 19.

[81] See only UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2010) UN Doc A/HRC/14/27 para 55; De Brabandere (n 25) 67.

The Universal Declaration of Human Rights (UDHR) states that 'every organ of society' – a term which possibly includes MNCs[82] – 'shall strive by teaching and education to promote respect for these rights and freedoms'. However, this statement is only contained in the preamble, which has not hardened into customary international law.[83] For the ICCPR, the Human Rights Committee has explicitly stated that it does not have direct horizontal effect,[84] while the Committee on Economic, Social and Cultural Rights observed with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) that 'private enterprises [are] not bound by the Covenant'.[85] Art. 1 of the ECHR binds only the 'high contracting parties [to] secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[86]

The lack of direct binding obligations for MNCs under international human rights law has been the subject of considerable criticism. One of the main causes of concern is a perceived 'protection gap'[87] if the safeguarding of human rights is left entirely to the states: first, because of the uneven status of recognition of human rights instruments in the various jurisdictions; second, because of their disparate enforcement, which is closely connected to the strength of the domestic legal system and the dependence on foreign investment of the respective states.[88] Another major ground for criticism is the 'governance gap',[89] which results from the discrepancy between the power of MNCs to severely harm human rights and the inability of domestic legislators to take effective measures in this respect. Some legal scholars have also criticised the one-sidedness of international human rights law which grants MNCs significant rights and benefits without holding them liable for abuses.[90] There are, however, not only concerns about the effective protection of human rights norms. Commentators have also pointed out, that companies suffer significant disadvantages due to the legal uncertainty of the current regime. Companies can incur increased costs and sustain reputational damage when they are measured according to human rights standards by which they are not even legally bound.[91]

Various approaches have been proposed to hold companies accountable under international human rights law. It has been argued that MNCs should incur direct liability for human rights abuses.[92] One of the initiatives to this effect was the drafting of the *UN Draft Norms on the responsibilities of transnational corporations and other*

[82] Muchlinski, 'Corporations in International Law' (n 15).
[83] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2007) UN Doc A/HRC/4/35 para 38. See Alvarez (n 38) 5.
[84] UN Human Rights Committee, General Comment No 31 (n 63) para 8.
[85] CESCR, General Comment No 18, 'The Right to Work – Art. 6' (2006) UN Doc E/C.12/GC/18 para 52.
[86] For an analysis of the indirect horizontal effect of the ECHR see Jan Wouters and Leen De Smet, 'Het E.V.R.M., internationale mensenrechtenstandaarden en (multinationale) ondernemingen' in Paul Lemmens (ed), *Uitdagingen door en voor het EVRM* (Kluwer 2005) 59, 68 ff.
[87] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (n 83) para 84.
[88] John Ruggie, 'Prepared Remarks at Clifford Chance' (2007) 4, <www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf> accessed 5 December 2013.
[89] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2008) UN Doc A/HRC/8/5 para 3.
[90] Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 Human Rights Law Review 511, 514; Pentikäinen (n 37) 149.
[91] Ruggie (n 88) 4; Adam Walczak, 'Coming to the Table: Why Corporations Should Advocate for Legal Norms for the Protection of Indigenous Rights' (2010) 42 The George Washington International Law Review 623, 649 ff.
[92] Pentikäinen (n 37) 149.

business enterprises with regard to human rights which will be treated in more detail below.[93] Fears of diluting the responsibilities of states and undermining their authority as well as the inapplicability of many human rights norms to private actors have effectively hindered the success of the Draft Norms, although a recent initiative in the Human Rights Council has re-opened the discussion on a legally binding human rights instrument for MNCs.[94] Others have advocated the imposition of aiding and abetting liability on MNCs for their complicity in human rights violations. The ensuing questions of *mens rea* and attribution have not yet been satisfactorily answered.[95] In light of the considerable resistance at the political, legal, and business level to impose binding human rights obligations on MNCs, a host of non-binding 'soft law' instruments has seen the light of day, which seeks to set certain human rights standards for MNCs. They have been lauded as a 'step in the right direction'[96] and are sometimes regarded as a precursor for binding rules. Critics, however, consider them inadequate to effectively protect human rights and ensure legal certainty for the private sector.[97] It has been argued that this 'illusion of regulation' may be 'worse than no regulation at all'.[98]

1. *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*

The *Draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (Draft Norms) were an ambitious attempt to create binding international human rights obligations for MNCs.[99] Drafted by a working group under the UN Sub-Commission on the Promotion and Protection of Human Rights and adopted in 2003 in the form of a resolution by the latter, they were rejected by the United Nations Commission on Human Rights (CHR), which stated in unequivocal terms that the draft had 'not been requested' and had 'no legal standing'.[100]

The Draft Norms were an innovative initiative insofar as they sought to directly apply human rights rules to MNCs, elevating them to full-fledged duty bearers under international human rights law.[101] Even though the primary responsibility of states was recognised, MNCs were obliged to 'promote, secure the fulfilment of, respect, ensure respect of and protect'[102] a broad range of human rights. Implementation measures included the adoption, dissemination, and implementation of internal rules of operation, periodic reporting duties as well as monitoring and verification by the UN.[103] However, the Draft Norms have been criticised for simply imposing on MNCs human rights instruments which are addressed to states.[104] Apart from the questionable legal basis for this move and ensuing practical difficulties, it was also feared that such an approach might result in a dilution of state responsibility and a

[93] Ch V.A.1.
[94] UNHRC Res 26/9 (2014) UN Doc A/HRC/RES/26/9, see ch V.A.3.
[95] Jena Martin Amerson, 'What's in a Name? Transnational Corporations as Bystanders under International Law' (2011) 85 St. John's Law Review 1, 36.
[96] Walczak (n 91) 643.
[97] *Ibid* 643 ff.
[98] Chesterman (n 33) 324.
[99] Wouters and Chanet (n 7) 383 ff.
[100] UNCHR Res 116 (2004) UN Doc E/CN.4/2004/L.11/Add.7.
[101] Amerson (n 95) 40.
[102] Draft Norms para 1.
[103] *Ibid* paras 15 and 16.
[104] Chesterman (n 33) 327.

weakening of sovereignty.[105] Extensive criticism led to the abandonment of the project and to the readjustment of international efforts.

2. Guiding Principles on Business and Human Rights

After the failure of the Draft Norms, the CHR established the mandate of a Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG), tasked with identifying and clarifying existing standards and practices. The Secretary General appointed John Ruggie, one of the authors of the Global Compact and influential critic of the Draft Norms.

In the first phase of his mandate (2005-2007), the SRSG conducted an extensive mapping of international standards and practices which then served as the basis for the formulation of recommendations during the second phase (2007-2008). He developed a three pillar framework, consisting of (1) the state duty to respect, protect and fulfil human rights, (2) the corporate responsibility to respect human rights, and (3) the need for effective remedy for victims of human rights abuses ('Protect, Respect and Remedy Framework' or 'Ruggie Framework'). In the last phase (2008-2011), he elaborated specific recommendations for the implementation of the Framework, resulting in the development of the *Guiding Principles on Business and Human Rights* which were endorsed by the Human Rights Council (HRC) on 16 June 2011.

The first pillar of the Ruggie Framework highlights that states are the primary duty bearers under international human rights law. It is their obligation to respect and fulfil human rights and to protect them against abuses, including those committed by MNCs. This requires states among other to enact, assess, and enforce human rights legislation, to ensure policy coherence, to provide guidance on human rights issues to companies – especially to those operating in conflict zones – and to promote respect for human rights by business partners.

The second pillar focuses on the responsibility of business entities to respect all internationally recognised human rights, which requires them to "avoid causing or contributing to adverse human rights impacts […] and address such impacts when they occur" and to "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships".[106] The responsibility of companies thereby differs significantly from the obligations of states. Whereas states have comprehensive duties to respect, protect and fulfil human rights, companies are merely responsible for ensuring that they do not abuse the human rights of others. The Guiding Principles recommend them to adopt "(a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".[107] Rejecting previous efforts to compile lists of human rights which are applicable to companies, the SRSG stated that "business enterprises can have an

[105] Larry Catá Backer, 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 Santa Clara Journal of International Law 37, 46.
[106] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31, para 13.
[107] *Ibid* para 15.

impact on virtually the entire spectrum of internationally recognised human rights" and concluded that their "responsibility to respect applies to all such rights".[108]

The third pillar recognizes the importance of effective access to remedy for the victims of human rights abuses, identifying responsibilities for both states and businesses. States should ensure the effectiveness of judicial grievance mechanisms and provide access to non-judicial and non-state-based grievance mechanisms. Businesses should establish or participate in the latter and ensure that their collaborative voluntary human rights initiatives provide for dispute settlement procedures.

"Principled pragmatism" is the label that the SRSG has often given to his approach.[109] Opting for a broad and transparent multi-stakeholder process he set out to move beyond the failure of the Draft Norms and to establish an "authoritative focal point around which actors' expectations could converge".[110] Rather than laying down principles *de lege ferenda* he reiterated the existing obligations of states under human rights law and connected them to a voluntary corporate governance framework.[111]

The result has led both to praise and criticism.[112] Supporters have lauded the open consultative process for successfully creating awareness for the problem[113] and appreciated the clear demarcation between state obligations and corporate responsibilities. The business world, which has consistently rallied against the imposition of binding human rights obligations and was starkly opposed to the Draft Norms, welcomed the Guiding Principles, although a 2013 study by Aaronson/Higham shows little impact on corporate practices so far.[114] Governments reacted equally favourably and a number of domestic and regional efforts to implement the Guiding Principles have seen the light of day.[115] NGOs, on the other hand, have generally been more supportive of the Draft Norms and criticised the 'regressive'[116] approach of the Guidelines to attribute merely non-binding

[108] *Ibid* para 12.
[109] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (n 81) para 4 ff.
[110] UNGA Third Committee (65th session) 'Statement by Professor John Ruggie: Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (26 October 2010) 1, <www.business-humanrights.org/media/documents/ruggie-statement-to-un-gen-assembly-26-oct-2010.pdf> accessed 5 December 2013.
[111] Backer (n 105) 43.
[112] See Jan Wouters and Nicolas Hachez, *Business and Human Rights in EU External Relations. Making the EU a Leader at Home and Internationally* (2009) Study for the European Parliament, Directorate-General for External Policies of the Union, Directorate B – Policy Department, EXPO/B/DROI/2009/2, PE407.014, para 29 ff, <http://www.europarl.europa.eu/document/activities/cont/200904/20090430ATT54804/20090430ATT54804EN.pdf> accessed 5 December 2013.
[113] Susan Ariel Aaronson and Ian Higham, '"Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' (2013) 35 Human Rights Quarterly 333, 336.
[114] *Ibid* 355 ff.
[115] See the 2011 revision of the OECD Guidelines for Multinational Enterprises; the three EU Sector Guides on Implementing the UN Guiding Principles on Business and Human Rights (2013) for employment and recruitment agencies (<http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-era-hr-business_en.pdf>), for the oil and gas sector (<http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-oag-hr-business_en.pdf>) and for the ICT sector (<http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf>); and the national action plans of the UK (September 2013), the Netherlands (December 2013), Italy (March 2014), Denmark (April 2014) and Spain (2014), available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> accessed 30 December 2014.
[116] 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' (2011) <ww.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 5 December 2013.

responsibilities to companies. Critics also deplored the preference of process over substance, referring to the failure of the Guiding Principles to establish a clear normative framework as a reference point against which the human rights performance of the business entity can be measured.[117]

Following up on the work of the SRSG, the HRC created a Working Group to promote dissemination and implementation of the Guiding Principles and launched an annual Forum on Business and Human Rights to strengthen dialogue and cooperation.[118] Bringing together participants from governments, businesses and civil society organisations around the world, the annual Forum provides an opportunity to discuss trends and challenges in the implementation of the Guiding Principles.[119] The mandate of the Working Group was extended for another period of three years in 2014.[120]

3. Human Rights Council Resolution 26/9

Two years after the adoption of the Guiding Principles, the representative of Ecuador delivered a statement during the 24th session of the Human Rights Council, re-opening the discussion by pushing for a legally binding human rights instrument for MNCs.[121] The statement was supported by a large number of states, including the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan and several GRULAC states.

At the 26th session of the Human Rights Council, Ecuador and South Africa jointly tabled a draft resolution which provided for the establishment of an open-ended intergovernmental working group ('IGWG') on transnational corporations and other business enterprises with respect to human rights. The mandate of the IGWG comprises the elaboration of a binding human rights instrument, governing the activities of MNCs and other business enterprises. The draft was co-sponsored by Algeria, Bolivia, Cuba, El Salvador, Nicaragua, Senegal and Venezuela and it was adopted as Resolution 26/9 by 20 votes to 14, with 13 abstentions.[122] Among the no voters were the United States, Japan, South Korea and the EU Member States. The proponents of the resolution argued, that while the Guiding Principles could be considered as a first step, a merely voluntary international framework was ultimately insufficient to provide the victims of corporate human rights abuses with the necessary legal protection, particularly given the often weak level of binding national regulation. The opponents of the resolution referred to the success of the Guiding Principles, the implementation of which would be threatened through the re-opened divisive discussion on a binding instrument. They stressed the importance of national implementation plans and the inappropriateness of a 'one size fits all' approach.[123]

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[117] Rory Sullivan and Nicolas Hachez, 'Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw – The Case of Institutional Investors' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Nijhoff 2012) 217, 227 ff.
[118] UNHRC Res 17/4 (2011) UN Doc A/HRC/RES/17/4.
[119] OHCHR, 'United Nations Forum on Business and Human Rights', <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx> accessed 30 December 2014.
[120] UNHRC Res 26/22 (2014) UN Doc A/HRC/RES/26/22.
[121] Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, 'Transnational Corporations and Human Rights', General Debate – Item 3, September 2013, <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> accessed 30 December 2014.
[122] UNHRC Res 26/9 (2014) UN Doc A/HRC/RES/26/9.
[123] Human Rights Council, 'Council extends mandates on extreme poverty, international solidarity, independence of judges, and trafficking in persons', 26 June 2014,

The IGWG is scheduled to launch its first deliberations and stakeholder consultations on a potential binding instrument in July 2015.

4. OECD Guidelines for Multinational Enterprises

The *OECD Guidelines for Multinational Enterprises* are a set of non-binding recommendations for responsible business conduct that the participating governments address to MNCs which operate in or from their territory. The first Guidelines were adopted in 1976, with the aim to improve the foreign investment climate by strengthening cooperation among OECD Member States and reducing the difficulties arising from the operations of MNCs. A revised version, adopted in 2000, recommended MNCs to 'respect the human rights of those affected by their activities' [124] for the first time. The latest revision in 2011 expanded this recommendation by introducing an entire chapter on human rights. Echoing the provisions of the Guiding Principles, it requests MNCs to respect human rights, avoid causing or contributing to adverse human rights impacts, address and seek ways to prevent or mitigate these impacts, have a policy commitment to respect human rights, carry out human rights due diligence, and provide for remediation of adverse human rights impacts. The 2011 revision also introduced a new approach to responsible supply chain management, extending the Guidelines beyond the immediate operations of the MNCs to their relations with e.g. subcontractors or franchisees.

Implementation of the Guidelines lies in the hands of the adhering states, the MNCs, the National Contact Points (NCPs) and the Investment Committee. Each adhering state is required to set up an NCP, tasked with promoting the Guidelines, handling inquiries, and solving disputes. Their role, which has not been uniformly successful,[125] was enhanced by the 2011 revision. If an issue arises under the Guidelines, they will contribute to its solution by making an initial assessment, offering good offices, and publishing the results of the procedure. If necessary, they are assisted by the Investment Committee[126] which also provides advice on the interpretation of the Guidelines. The outcome of these procedures is, however, necessarily non-binding and the names of the companies involved are typically not disclosed in order to protect confidential information.[127] Their effect has thus been characterised as 'commercial rather than legal'.[128]

5. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The *ILO Tripartite declaration of principles concerning multinational enterprises and social policy* is a non-binding instrument which was adopted after tripartite

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<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E> accessed 30 December 2014.

[124] OECD, Guidelines for Multinational Enterprises (2000) <www.oecd.org/investment/mne/1922428.pdf> accessed 5 December 2013, Part I, ch II, para 2.

[125] Wouters and Ryngaert (n 6) 972 ff; Walczak (n 91) 646; Zambrana Tévar (n 5) 404.

[126] The OECD Investment Committee is tasked with the interpretation and implementation of the Guidelines. It monitors the functioning of the Guidelines, provides a forum for discussion as well as for dispute resolution, offers recommendations and issues reviews and analyses. The Committee was established in 2004, merging the former Committee on International Investment and Multinational Enterprises (CIME) and the former Committee on Capital Movements and Invisible Transactions (CMIT). For more information see the On-Line Guide to OECD Intergovernmental Activity, <www2.oecd.org/OECDGROUPS/Bodies/ShowBodyView.aspx?BodyID=7232&Lang=en&Book=True> accessed 5 December 2013.

[127] OECD Guidelines for Multinational Enterprises (n 12) Part II, Procedural Guidance, para C.3. See Zambrana Tévar (n 5) 404.

[128] De Brabandere (n 25) 82.

negotiations between workers' and employers' organisations and state governments in 1977 and has since been amended twice in 2000 and 2006.[129] Reacting to concerns about labour standards and social issues, the Declaration contains principles on employment, training, conditions of work and life, and industrial relations, which 'governments, employers' and workers' organisations and multinational enterprises are recommended to observe on a voluntary basis'.[130] Without providing for a complaints mechanism similar to the one under the OECD Guidelines, the Declaration merely envisages periodic surveys in order to measure its effectiveness and a clarification process, whereby the parties may submit requests for interpretation to the ILO.

6. Global Compact

The Global Compact is a 'soft law' policy initiative for businesses which voluntarily commit to respect and support ten principles in the areas of human rights, labour, the environment, and anti-corruption, derived from the UDHR, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention Against Corruption. The Global Compact was announced by UN Secretary-General Kofi Annan in 1999 and was officially launched in 2000. Today it counts more than 10,000 participants from over 130 countries, making it the largest non-binding corporate responsibility initiative world-wide.[131] Companies have to submit an annual report on the implementation of the ten principles, which, however, is not subject to any review mechanism and has consequently been labelled a mere 'public relations exercise'.[132] Supporters have lauded its contribution to raising awareness for the underlying issues, however, critics decry the lack of monitoring and audit, both for potential and current candidates.[133]

7. Self-regulation

Rejecting the need for 'hard law', MNCs have frequently opted for voluntary initiatives in which they pledge their respect and support for human rights.[134] The variety of existing instruments is broad, comprising codes of conduct, transparency initiatives, and social labels. They can have 'soft' positive effects by putting the spotlight on human rights issues and evidencing a certain recognition of responsibility by the respective companies, thus possibly preparing the ground for binding regulation.[135] It could also be argued that these voluntary commitments have very tangible legal consequences: failure to comply with a self-imposed code of conduct could amount to deceptive advertisement[136] or evidence a company's violation of its duty of care, entailing liability for damages under tort law.[137]

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[129] Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' (2009) 6 Miskolc Journal of International Law 24, 26.

[130] ILO, Tripartite declaration of principles concerning multinational enterprises and social policy (n 12) para 7.

[131] 'Overview of the UN Global Compact' (22 April 2013) <www.unglobalcompact.org/AboutTheGC/index.html> accessed 5 December 2013.

[132] Zambrana Tévar (n 5) 405.

[133] Weilert (n 31) 914.

[134] In 2008 86% of the top 200 MNCs had adopted a code of conduct, see Pascale Deumier, 'Les codes de conduite des entreprises et l'effectivité des droits de l'homme' in Laurence Boy, Jean-Baptiste Racine, Fabrice Siiriainen (eds), *Droit économique et droits de l'homme* (Larcier 2009) 671, 673.

[135] Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal 443, 532 f.

[136] See Su-Ping Lu, 'Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law' (2000) 38 Columbia Journal of Transnational Law 603.

[137] Wouters and Ryngaert (n 6) 957.

Nevertheless, the overall merits and legitimacy of corporate human rights self-regulation are disputed. Among the plethora of initiatives, the majority does not provide for independent third-party compliance monitoring or even transparent and accurate self-evaluation and most employ vague and aspirational language instead of making precise and comprehensive human rights commitments.[138] It has been observed that it might be 'inappropriate' to leave human rights questions to corporate self-regulation and unwise to assign companies a role which they are unable to fulfil.[139] Some authors have even pointed to the danger that self-regulation might 'give the appearance of regulation and thereby ward off criticism and the imposition of external regulation'.[140]

8. Enforcement

MNCs incur no direct legal obligations under international human rights law and consequently no enforcement mechanism under international law exists. The picture changes, however, if one takes a look at the national level, where MNCs have been sued for human rights abuses before civil and criminal tribunals.[141]

The most prominent cases were argued in the United States under the Alien Tort Statute (ATS), which provides district courts with jurisdiction *ratione materiae* for 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[142] Having fallen into oblivion after its adoption in 1789,[143] the statute was rediscovered in the landmark case *Filártiga v Peña-Irala* (1980)[144] where the Second Circuit ruled in favour of two Paraguayan citizens who had sued a fellow countryman over a case of torture that had taken place in Paraguay. The Court assumed subject-matter jurisdiction because 'deliberate torture perpetrated under colour of official authority violates universally accepted norms of the international law of human rights'.[145] In *Sosa v Alvarez-Machain* (2004)[146] the US Supreme Court affirmed jurisdiction for violations of those international norms which are 'specific, universal, and obligatory'.[147]

The ATS quickly became a popular tool for human rights activists to hold perpetrators of human rights abuses accountable. In 1995 the US Court of Appeals for the Second Circuit in *Kadic v Karadzic* (1995)[148] opened the door for claims against non-state actors acting without state involvement. Soon, the first successful law suit against a

[138] Penelope Simons, 'Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes' (2004) 59 Relations Industrielles/Industrial Relations 101, 106 ff, 113 ff.
[139] Muchlinski, *Multinational Enterprises and the Law* (n 10) 525 f.
[140] Gatto (n 3) 22.
[141] For an analysis of the justiciability of corporate human rights violations before domestic courts see Katja Sontag, 'La justiciabilité des droits de l'homme à l'égard des sociétés transnationales' in Laurence Boy, Jean-Baptiste Racine, Fabrice Siiriainen (eds), *Droit économique et droits de l'homme* (Larcier 2009) 569.
[142] 28 USC § 1350.
[143] Douglas M. Branson, 'Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation' (2011) 9 Santa Clara Journal of International Law 227, 230.
[144] *Filártiga v Peña-Irala* 630 F2d 876 (2d Cir 1980).
[145] *Ibid* para 2.
[146] *Sosa v Alvarez-Machain* 542 US 692 (2004) 331 F3d 604 reversed.
[147] *Ibid*.
[148] *Kadic v Karadzic* 70 F3rd 232 (2nd Cir 1995) rehearing denied, 74 F3rd 377 (2nd Cir 1996) cert denied 518 US 1005 (1996).

corporate entity, *Doe v Unocal* (1997),[149] followed. However, legal uncertainty about the relationship between domestic US law and international law persisted. Especially the question whether the scope of liability should be governed by international or domestic law remained contentious.

The US Supreme Court commented on this issue in a footnote of the judgment in *Sosa v Alvarez-Machain*, stating that '[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual'.[150] Picking up on this, the majority in the Second Circuit decision *Kiobel v Royal Dutch Petroleum* (2010)[151] concluded that the scope of liability – including the question of corporate liability – must be determined by international law instead of domestic law. After an analysis of decisions of international tribunals, treaties, and the opinions of international legal scholars, it decided that corporate liability is no 'specific, universal and obligatory' norm of international law and can therefore not 'form the basis of a suit under the ATS' – thus sounding the 'death knell'[152] for corporate liability under the ATS. The Supreme Court granted certiorari in 2011 but requested the parties to submit additional briefs on the extraterritorial application of the ATS. Without referring to the issue of corporate liability, the Supreme Court held in April 2013 that 'the presumption against extraterritoriality' – 'which provides that when a statute gives no clear indication of an extraterritorial application, it has none'[153] – 'applies to claims under the ATS',[154] thereby barring all claims which do not 'touch and concern the territory of the United States […] with sufficient force to displace the presumption against extraterritorial application'.[155] This effectively ended the role of the ATS as a 'bonanza'[156] for human rights activists.

It should also be noted that even without legal enforcement mechanisms human rights abuses can be costly for MNCs. Tried in the court of public opinion, they can suffer considerable reputational and financial damage through strikes and boycotts as well as loss of investor and consumer confidence. NGO pressure as illustrated by the 'Green Scissors Campaign' can cost companies substantial sums in incentives and subsidies.[157] These external factors can then translate into internal pressure through shareholder resolutions.[158]

B. International Environmental Law

Multilateral Environmental Agreements (MEAs) are addressed primarily at states and have at most indirect regulatory implications for MNCs. In accordance with the fundamental 'polluter pays' principle,[159] a few specialised agreements establish civil liability rules for private actors which have the potential to cause particularly grave

[149] *Doe I v Unocal Corp*. 963 F Supp 880 (CD Cal 1997), dismissed in part, 110 F Supp 2d 1294 (CD Cal 2000), aff'd in part, rev'd in part, 395 F3d 932 (9th Cir 2002), vacated, reh'g en banc granted, 395 F3d 978 (9th Cir 2003), dismissed, 403 F3d 708 (9th Cir 2005).
[150] *Sosa v Alvarez-Machain* (n 146) fn 20.
[151] *Kiobel v Royal Dutch Petroleum* 621 F3d 111 (2d Cir 2010), 569 US __ Docket No 10-1491 (2013).
[152] Branson (n 143) 234.
[153] Morrison v National Australia Bank 561 US __ Docket No 08-1191 (2010).
[154] *Kiobel v Royal Dutch Petroleum* (n 151) para III.
[155] *Ibid* para IV.
[156] Branson (n 143) 228.
[157] Walczak (n 91) 644.
[158] *Ibid* 651.
[159] Miriam Mafessanti, 'Responsibility for Environmental Damage under International Law: Can MNCs Bear the Burden? … And How?' (2009-2010) 17 Buffalo Environmental Law Journal 87, 90.

environmental damage, such as oil spills or nuclear leakages.[160] All of these instruments rely on domestic implementation, and require the contracting parties to establish the necessary enforcement mechanisms. Noteworthy are also the provisions on sustainable development in the non-binding OECD Guidelines and Agenda 21, last reaffirmed at the Rio+20 conference.[161] Compared to international human rights law, self-regulation by companies through codes of conduct or certification systems, e.g. so called eco-labels, is more developed.[162] While the systems' institutional designs vary considerably, many provide for third- or second-party conformity assessments and a few contain dispute settlement or appeal mechanisms.[163]

C. International Criminal Law

International criminal law does not and has never provided for jurisdiction over legal persons. Already the first international criminal tribunal, the International Military Tribunal in Nuremberg, only exercised jurisdiction over individuals. It famously held: 'Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced'.[164] Neither of the *ad hoc* international criminal tribunals which were subsequently created by the UN Security Council exercised jurisdiction over corporate entities. The 1998 Draft Statute of the International Criminal Court, on the other hand, provided that 'the Court shall also have jurisdiction over legal persons, with the exception of states, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives'.[165] This approach was later abandoned, firstly because corporate criminal accountability is unknown to many domestic legal systems, which would have caused difficulties for the application of the complementarity principle,[166] and secondly because some feared that states might be considered hypocritical if they established criminal responsibility for every entity except for themselves.[167] The extension of jurisdiction to corporate entities made it onto the agenda of the 2010 Kampala Review Conference, but received only limited attention due to the strong focus on the crime of aggression.[168]

There are, however, several domestic jurisdictions which recognise the criminal liability of legal persons, among them Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States.[169]

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[160] See the International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3; Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963, entered into force 12 November 1977) 1063 UNTS 265.
[161] UNGA 'The Future We Want' (27 July 2012) UN Doc A/RES/66/288.
[162] Muchlinski, *Multinational Enterprises and the Law* (n 10) 546-556.
[163] See for an analysis of 400 eco-labels: Axel Marx, 'Varieties of legitimacy: a configurational institutional design analysis of eco-labels' (2013) 26 Innovation: The European Journal of Social Science Research 268.
[164] 'Excerpts from the Judgment of the International Military Tribunal, Nürnberg, 30 September-1 October 1946' (1946-1947) 45 International Law Studies Series. US Naval War College 243, 259.
[165] Draft Statute for the International Criminal Court (1998) UN Doc A/Conf.183/2/Add. 1, art 23.
[166] Bismuth (n 26) 209; Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese Journal of International Law 43, 45.
[167] Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (OUP 2002) 767, 779.
[168] van der Wilt (n 166) 45.
[169] But not e.g. Argentina, Germany, Indonesia, Spain, Ukraine: see Anita Ramasastry and Robert C. Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries' (2006) Fafo-report no 536, 13; Jan Wouters and Leen De Smet, 'De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige

It is also noteworthy that several international instruments contain criminal liability provisions for legal persons, such as the *European Convention on the Protection of the Environment through Criminal Law*, the *United Nations Convention against Corruption*, the *United Nations Convention on the Suppression of the Financing of Terrorism* and the *United Nations Convention against Transnational Organized Crime*. All of these conventions oblige the state parties to establish the liability of legal persons for the commission of crimes as defined under the respective instrument. Liability is, however, never reduced to criminal liability alone, but leaves the Member States a leeway to adopt administrative or civil measures instead.

VI. CONTRIBUTION TO INTERNATIONAL LAW MAKING

Although states are the primary creators of international law, MNCs have various avenues at their disposal to shape the law making process. They can contribute to the work of the ILO through the 'tripartism' mechanism and pursue their interests in international investment arbitration or (through WTO Members) WTO dispute settlement. Above all, they can use their political, social, and economic power to influence the legislative process by lobbying at the national level of the respective Member State, at the EU and international level, or by participating in dialogue and consultation. However, conflicting policy goals of states or international organisations as well as NGO activism can limit the clout of MNCs.[170]

VII. CONCLUSION

It has been argued in this chapter that, on the one hand, MNCs can contribute to economic and technological development, increasing the wealth and the living conditions of society. They therefore merit protection against undue government interference and for the safeguarding of a stable and reliable business environment. On the other hand, MNCs can severely impact human rights or the environment and even commit crimes for which they should be held accountable. Both objectives are insufficiently achieved at the domestic level. MNCs defy concepts of nationality and elude the grip of the – unwilling or unable – national legislator. But the turn to international law has encountered difficulties as well. Lengthy debates about the international legal subjectivity of MNCs have precluded involvement with the substantive question of the rights and obligations of companies under international law. Subjectivity has been used as a threshold, awaiting the positive granting of rights and obligations by states. This cannot, however, hide the fact that MNCs already enjoy considerable rights under international investment law and under international human rights law. They can ensure protection of their assets before domestic courts and through arbitration processes and can claim violations of their rights before the ECtHR. Conversely, MNCs do not have binding obligations under international law. Most importantly, they are not bound by international human rights law, notwithstanding a range of initiatives, attempting to create both voluntary and non-voluntary instruments. At most, they bear certain responsibilities not to harm human rights, but implementation and enforcement depend on the respective government authorities.

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schendingen van het internationaal humanitair recht in het licht van de Belgische Genocidewet' in Eva Brems and Pieter Vanden Heede (eds), *Bedrijven en mensenrechten. Verantwoordelijkheid en aansprakelijkheid* (Maklu 2003) 309.

[170] Muchlinski, 'Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers?* (Ashgate 2010) 9, 13 ff.

In light of the ever growing power of MNCs and considering ongoing reports about their involvement in human rights abuses and environmental harm, the calls for stronger obligations of MNCs under international law persist. Caution should be exercised, though, since a single-minded focus on MNCs risks distracting from the primary responsibility of states. Here, many instruments are readily available which might benefit from increased attention and achieve similar results. The 'Ruggie Framework' has set in motion a development, which provides for heightened MNC responsibility without diluting the primary responsibility of states. Whether the new initiative towards a legally binding human rights instrument will manage to overcome the existing political divisions or share the fate of earlier attempts to move beyond a voluntary framework, remains to be seen.

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